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January 19, 2003

Commissioners, Public Disclosure Commission
Public Disclosure Commission
711 Capitol Way, Room 206
Olympia, WA 98504-0908

Re: Proposed WACs 390-17-100 and 390-17-110

Dear Commissioners:

This letter will supplement and clarify the comments I submitted on behalf of the Washington State Labor Council in advance of your December 3, 2003 meeting. Please accept my apologies for not making a timely oral presentation in support of the earlier submission. As the WSLC and its affiliates believe the proposed WACs are a matter of grave importance, we sincerely hope that a full discussion will be held during the January 28, 2003 meeting.

My comments are organized in the order of the proposed WACs.

Re: 390-17-100

My only proposed change to WAC 390-17-100 is that the first sentence of (2) be modified. It currently reads:

(2) Employers may either use the suggested format below or their own form if it provides the following information:

Because the form is chosen, not by the employer, but by the entity soliciting the authorization, I suggest that the sentence be modified to eliminate the indication that the employer is to choose the form of the card. I suggest the following language:

(2) (Employer may either use) Forms used for payroll deduction may either conform to the suggested format below or (their own form) be in a different format if it provides the following information:

The change does not alter the substance of the WAC regarding the content and form of the authorization. It merely eliminates the implication that the employer chooses the format. The language utilized to replace the "employer" is the same language already used in the proposed WAC at 390-17-100(3). Therefore, the proposed change eliminates an unnecessary inconsistency between the language of the succeeding paragraphs.

Re: 390-17-110

As was reflected in my December 1, 2002 submission on behalf of the WSLC, the WSLC and its affiliates do not agree that the 2002 amendments to RCW 42.17.680(3) contemplate that the employer should communicate with union members regarding their decision to contribute to a union-sponsored PAC.

We do not believe it is appropriate for the employer to communicate with union members regarding their decision to support the Political Committee of a labor organization. For the employer to engage in such communication is inconsistent with the established interpretation of 680(3). In addition, such direct communication from the employer to union members may well violate both state and federal labor law.

WAC 390-17-110(1)(b)

WAC 390-17-110(1)(b) implements the 2002 changes to RCW 42.17.680(2). That subsection prohibits discrimination by any "employer or labor organization." Therefore, there is no question that the additional obligation imposed by the 2002 amendment may apply to an employer or labor organization.

But that does not mean that with respect to all contributors, the obligation imposed by the new language can be satisfied by either the employer or labor organization. The new language requires (in the passive voice) that those who have authorized payroll deduction receive certain notice of non-discrimination. Logically, that notice should be provided by the entity seeking the authorization.

The employer is not involved in the solicitation of a union member by the union, and logically should have no role in communicating with the contributor. The anomaly of having the employer provide notice to a union contributor is clear if you reverse the roles. No one would suggest that if the employer solicited its management employees to authorize a payroll deduction to the employer's PAC, the union should have a role in sending management employees annual notice of their right to be free of discrimination based on the decision to contribute or not.

Logically, the obligation to provide annual notice of non-discrimination should fall on the same entity that provided the notice of non-discrimination included on the initial authorization card – that is, the entity that made the solicitation.

Our prior suggested language regarding 110(1)(b) included both that the annual non-discrimination notice was to be provided by the entity soliciting the contribution, and that the employer was forbidden from diverting wages if that notice was not provided. In the brief discussion at the December 3 meeting, the Chair indicated that the latter provision exceeded the statute. In light of that observation, we propose that 110(b)(1) provide simply:

> (1)(b) The written notification shall be provided by the entity soliciting the employee's contributions.

WAC 390-17.110(2)(a)

1. The proposed WAC is inconsistent with *EFF v. WEA*

WAC 390.17.110(2)(a) implements amendments to RCW 42.17.680(3). The Washington Supreme Court has already interpreted RCW 42,17,680(3). In *State ex rel Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d 615 (2000), the court decided that, because a union was not "the employer, or other entity responsible for the disbursement of funds in payment of wages or salaries," it could not violate that subsection.

In *EFF v. WEA*, the court concluded that 680(3) prohibited those encompassed within the quoted language from "diverting a portion of those funds for political contributions." The court did not conclude that the statute required the employer to obtain the authorizations required as a pre-condition of those diversions. Rather, it concluded that the employer could not knowingly divert wages for such use "except upon the written request of the employee."

The proposed regulation reinterprets 680(3) in light of the 2002 amendments. The 2002 amendments replaced the requirement that contributors re-authorize annually with a requirement that they be advised annually of their right to terminate their authorization. But it did not change the fundamental fact that 680(3) imposes limitations on the employer, in the context of the employer diverting funds from the wages or salaries of employees.

The prohibitions in the prior version did not apply only to the employee's initial authorization for a payroll deduction. Subsection 680(3) also addressed annual reauthorization. In effect, the annual reauthorization was an element of the "written request of the employee." The employer was forbidden to divert wages to a PAC if there had been no authorization in the first instance, or if no re-authorization had been obtained in the prior 12 months. There was never any suggestion that the employer had a duty to obtain a new authorization after the first authorization expired. Rather, if there was no reauthorization, the employer was required to terminate the diversion of wages.

That the annual reauthorization requirement has been replaced with an annual notice requirement should not change the analytic framework. The employer's responsibility is still to divert funds to a PAC only if the entity seeking the authorization complied with its obligations. These now include both the initial authorization, and annual notice of the right to revoke, rather than the initial authorization, and annual reauthorization, as was the case under the prior version of 680(3).

Staff evidently believes that the amendment has changed the roles of the employer and the union. It asserts that an employer is no longer a passive player. Rather, staff asserts that the employer's only obligation is to make sure the notice is given. Staff goes so far as to assert that the employer may not terminate deductions if no annual notice is given. Rather, it must continue to divert funds, even if it knows that no notice has been given.

Staff further asserts that the employer violates no law by doing so. Rather, the only violation is by the employer and the union for failing to provide the required notice. Evidently, staff contemplates that the penalty for failure to provide the annual notice is a PDC fine, just as it would be for any other violation of statute.

The WSLC submits that the proper interpretation is that the employer may not divert wages unless it has received confirmation that the required notice was given. This is exactly consistent with the court's interpretation of 680(3). It is also practical, as it assures that wages are not diverted in the first instance. By so doing, it protects the employees' rights at the outset, rather than permitting those rights be violated, pending punishment by the PDC.

2. The proposed WAC requires employer action that violates federal and state law

A basic tenet of both federal and state labor law is that the employer is not to interfere with the relationship between a union and its members. Because the proposed WAC 390-17-110(2) invites such interference, it should be rejected.

Section 8(a)(2) of the National Labor Relations Act makes it an unfair labor practice for an employer to ". . . interfere with the formation of administration of any labor organization or contribute financial or other support to it."

An employer violates labor law when it undertakes to communicate with its employees regarding their relationship with their union, whether that communication is helpful or hurtful of the union's efforts.

It is an unfair labor practice for an employer to assume the financial obligations of a union. *Perry Coal v. NLRB*, 284 F. 2d 910 (7th Cir. 1960). Likewise, it is an unfair labor practice for the employer to solicit on behalf of the union for authorization of dues check off from its employees. See, e.g. *Tribulani's Detective Agency*, 229 NLRB 698 (1977), *Atlas Guard Service*, 229 NLRB 698 (1977). Thus, if the employer benignly assists the

union in maintaining its PAC by sending the notices required to validate the previously received authorizations, that constitutes a potential impermissible assistance to the union.

A far more sinister possibility is that the employer will undertake to comply with the proposed WAC by including, along with notice to employees of their right to revoke the authorization, editorial comment regarding the union's political positions, and why the employer believes it is not in the employees' interest to provide voluntary financial support for those efforts.

Employers may well be tempted to include such editorial comments, as organized labor and private employers typically have contrasting political agendas. For a private employer to denigrate the union and its activities violates Section 8(a)(2) of the NLRA. For a public employer to do so violates Washington State law (RCW 41.56.140), *Benton County*, PERC Dec. 6072-A.

The conflict with federal and state labor law thus created can easily be avoided, by maintaining the established rule that the employer's responsibility under 680(3) is simply to require confirmation that the initial authorization has been obtained, and that the required annual notice has been provided, as a condition of diverting wages to a political committee.

Conclusion

The current proposed WACs represent good faith attempts to implement the 2002 amendments to RCW 42.17.680. However, because they diverge from the settled interpretation of 680(3) and needlessly implicate potential violations of federal and state labor laws, they should not be adopted as written.

Thank you for your consideration of this request.

Very truly yours,

James D. Oswald
cc: Rick Bender, Washington State Labor Council

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December 17, 2002

Ms. Vickie Rippie, Executive Director
Public Disclosure Commission
711 Capitol Way, Room 403
P. O. Box 40908
Olympia, WA 98504-0908

RE: WAC 390-17-110

Dear Ms. Rippie:

I am writing this letter on behalf of Washington Education Association with regard to proposed rule WAC 390-17-110. We are concerned about the potential impact of the proposed rule on the privacy interests of those who contribute to a political committee via payroll deduction less than $25 annually.

As the Honorable Judge Terry Lukens ruled in issuing a preliminary injunction in ***WEAPAC v. PDC***, King County Cause No. 01-2-29388-5KNT, Chapter 42.17 RCW requires that the names of small contributors, including those who contribute less than $25 per year, whether through payroll deduction or otherwise, not be disclosed to any third party. Although the proposed rule was not specifically addressed in the injunction as it was not yet in existence at that time, the rationale underlying the court's ruling would unquestionably include records received by the PDC pursuant to proposed WAC 390-17-110(4). We are confident a reviewing court would again so hold.

Consequently, we request that the Commission, provide by rule that the list of those employees given notice pursuant to WAC 390-17-110, whose annual aggregate contribution to WEA-PAC is twenty-five dollars or less during the calendar year, is exempt from public disclosure. In lieu of disclosing these names, unique numerical identifiers must be substituted for the names of persons listed by the employer as having received the applicable notices, in a manner similar to that set forth in the preliminary injunction for the authorizations themselves.

Thank you for your attention to the matters addressed herein. Please contact me if you would like to discuss this matter further.

Very truly yours,

Harriet Strasberg

HARRIET STRASBERG

cc: Aimee Iverson